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Burbank Police Department Officer Gunn
8

9 **UNITED STATES DISTRICT COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA**
11

12 PRESTON SMITH, an individual;

13 Plaintiff,
14

15 vs.

16 CITY OF BURBANK; BURBANK
17 POLICE DEPARTMENT;
BURBANK POLICE DEPARTMENT
18 OFFICER GUNN; BURBANK
POLICE DEPARTMENT OFFICER
19 BAUMGARTEN; BURBANK
POLICE DEPARTMENT OFFICER
20 EDWARDS; AND DOES 1
THROUGH 100, INCLUSIVE
21

22 Defendants.
23
24

Case No. CV 10-08840 R (AGR_x)

Honorable Manuel L. Real

**SEPARATE STATEMENT OF
UNCONTROVERTED MATERIAL
FACTS AND CONCLUSIONS OF
LAW IN SUPPORT OF OFFICER
GUNN'S MOTION FOR
SUMMARY JUDGMENT**

Date: July 2, 2012
Time: 10:00 a.m.
Courtroom: 8

*[Officer Gunn's Notice of Motion and
Motion for Summary Judgment or, in
the Alternative, Summary Adjudication;
Declarations and Exhibits, and
[Proposed] Judgment filed
concurrently herewith]*

25 TO THE HONORABLE COURT, ALL PARTIES, AND TO THEIR COUNSEL
26 OF RECORD:

27 Defendant OFFICER NEIL GUNN, JR. (hereinafter "Officer Gunn")
28 hereby submits the following Separate Statement of Uncontroverted Material

1 Facts and Conclusions of Law in Support of Officer Gunn's Motion for Summary
2 Judgment.

3
4 Dated: June 4, 2012

LAWRENCE BEACH ALLEN & CHOI, PC

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7 By /s/ Nathan A. Oyster
8 Nathan A. Oyster
9 Attorneys for Defendant
10 Burbank Police Department Officer Gunn
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UNCONTROVERTED MATERIAL FACTS

FACT

SUPPORTING EVIDENCE

- | | |
|---|---|
| <p>1. On April 10, 2009, Plaintiff Preston Smith ("Plaintiff") and Mario Champieux ("Mr. Champieux") were being questioned by Officer Gunn near a liquor store in the City of Burbank.</p> <p>2. Officer Gunn asked Plaintiff and Mr. Champieux to stand in front of his patrol vehicle. Officer Gunn exited his vehicle, illuminated his flashlight on the ground, and began searching the nearby grounds.</p> <p>3. Plaintiff ran away from Officer Gunn despite orders to stop.</p> <p>4. Officer Gunn engaged in foot-pursuit of Plaintiff which allegedly lasted about 30 to 40 seconds.</p> | <p>1. Ex. "A" to Declaration of Nathan A. Oyster ("Oyster Decl.") [Complaint ("Cpt."), ¶ 16]; Ex. "C" to Oyster Decl. [Transcript of Plaintiff's May 30, 2012 Deposition ("Plaintiff's May 30, 2012 Depo"), 384:20-385:18].</p> <p>2. Ex. "C" to Oyster Decl. [Plaintiff's May 30, 2012 Depo, 388:14-390:2];</p> <p>3. Ex. "D" to Oyster Decl. [Declaration of Plaintiff ("Plaintiff Decl."), ¶ 2]; Ex. "D" to Oyster Decl. [Misdemeanor criminal complaint at 1].</p> <p>4. Ex. "C" to Oyster Decl. [Plaintiff's May 30, 2012 Depo, 388:14-390:2].</p> |
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FACT

SUPPORTING EVIDENCE

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5. At the end of the foot chase, Plaintiff jumped over a wall in a dark residential neighborhood alley and into a residential backyard.
6. While Plaintiff was in the residential backyard, a struggle ensued which allegedly lasted three to four minutes.
7. During this struggle, Plaintiff used his elbows, hands, arms, and legs against Officer Gunn and other responding Burbank Police Department Officers who were trying to lawfully detain Plaintiff.
8. Despite acknowledging these actions in his plea during the criminal matter, Plaintiff denies having used any force against

5. Ex. "C" to Oyster Decl. [Plaintiff's May 30, 2012 Depo, 361:6-7, 394:10-13].
6. Ex. "C" to Oyster Decl. [Plaintiff's May 30, 2012 Depo, 397:8-398-10].
7. Ex. "E" to Oyster Decl. [Misdemeanor criminal complaint at 1-2]; Ex. "F" to Oyster Decl. [Misdemeanor sentencing memorandum]; Ex. "G" to Oyster Decl. [Misdemeanor advisement of rights, waiver, and plea form at ¶¶ 2, 16, and 21]; Ex. "H" to Oyster Decl. [Transcript of April 29, 2009 hearing at 3:4-6].
8. Ex. "B" to Oyster Decl. [Transcript of Plaintiff's May 17, 2012 Deposition ("Plaintiff's May 17, 2012 Depo"), 106:12-

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FACT

SUPPORTING EVIDENCE

Officer Gunn and the other
responding Officers.

25].

9. At the end of the incident in the
residential backyard, Plaintiff
was placed in handcuffs.

9. Ex. "A" Oyster Decl. [Cpt, ¶ 18].

10. Plaintiff was transported via
ambulance to St. Joseph's
Hospital for emergency medical
treatment.

10. Ex. "A" Oyster Decl. [Cpt, ¶ 18].

11. On April 14, 2009, a four-count
misdemeanor complaint was
filed against Plaintiff in the Los
Angeles Superior Court.

11. Ex. "E" to Oyster Decl.
[Misdemeanor criminal
complaint at 1].

12. Count II of the complaint alleged
that Plaintiff "did willfully and
unlawfully resist, delay or
obstruct a public officer
discharging or attempting to
discharge any duty of his office
or employment" – a violation of
California Penal Code §
148(a)(1).

12. Ex. "E" to Oyster Decl.
[Misdemeanor criminal
complaint at 1].

FACT

SUPPORTING EVIDENCE

13. The criminal complaint alleged that Plaintiff ran from Officer Gunn during a lawful detention and despite orders to stop.

13. Ex. "E" to Oyster Decl. [Misdemeanor criminal complaint at 1].

14. The criminal complaint alleged that Plaintiff used elbows and hands in a fist to strike Officer Baumgarten, Officer Edwards, Officer Joel, Officer Rodriguez, and Officer Gunn during the officers' attempt to lawfully restrain Plaintiff.

14. Ex. "E" to Oyster Decl. [Misdemeanor criminal complaint at 1].

15. The criminal complaint alleged that Plaintiff flailed arms and kicked legs when Officer Baumgarten, Officer Edwards, Officer Joel, Officer Rodriguez, and Officer Gunn tried to detain him.

15. Ex. "E" to Oyster Decl. [Misdemeanor criminal complaint at 1-2].

16. On April 29, 2009, Plaintiff plead guilty to violating Count II of the complaint – California Penal Code § 148(a)(1).

16. Ex. "F" to Oyster Decl. [Misdemeanor sentencing memorandum]; Ex. "G" to Oyster Decl. [Misdemeanor advisement of rights, waiver, and

FACT

SUPPORTING EVIDENCE

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17. Plaintiff signed a four-page document entitled "Misdemeanor Advisement of Rights, Waiver, and Plea Form", which freely acknowledges his guilty plea.

18. Plaintiff's plea was approved by the Court.

19. Plaintiff's conviction has not been expunged, withdrawn, or overturned.

20. Plaintiff also plead guilty to being under the influence of cocaine, a violation of Health and Safety Code § 11550(a).

plea form at ¶¶ 2, 16, and 21];
Ex. "H" to Oyster Decl.
[Transcript of April 29, 2009
hearing at 3:4-6].

17. Ex. "G" to Oyster Decl.
[Misdemeanor advisement of
rights, waiver, and plea form].

18. Ex. "G" to Oyster Decl.
[Misdemeanor advisement of
rights, waiver, and plea form at
4]; Ex. "H" to Oyster Decl.
[Transcript of April 29, 2009
hearing at 4:5-6].

19. Ex. "I" to Oyster Decl.
[Stipulation re: Plaintiff's
Conviction].

20. Ex. "E" to Oyster Decl.
[Misdemeanor criminal
complaint at 2]; Ex. "F" to
Oyster Decl. [Misdemeanor
sentencing memorandum]; Ex.

FACT

SUPPORTING EVIDENCE

21. Neither Plaintiff nor his criminal
counsel limited the factual basis
for Plaintiff's criminal plea.

"G" to Oyster Decl.
[Misdemeanor advisement of
rights, waiver, and plea form at
¶¶ 2, 16, and 21].

21. Ex. "H" to Oyster Decl.
[Transcript of April 29, 2009
hearing at 1:9-5:25].

CONCLUSIONS OF LAW

1. Summary judgment must be rendered when there is no genuine issue
as to any material fact and the moving party is entitled to judgment as a matter of
law. Federal Rules of Civil Procedure, Rule 56 (c); *British Airways Board v.*
Boeing Co., 585 F.2d 946, 951 (9th Cir. 1978).

2. Further, if summary judgment is not granted on the entire action, a
court may render partial summary judgment on individual issues as to which there
remains no genuine issue of material fact. Federal Rules of Civil Procedure, Rule
56 (b), (d).

3. "If the evidence is merely colorable, or is **not significantly**
probative, summary judgment may be granted." *Anderson v. Liberty Lobby*, 477
U.S. 242, 249-250, 106 S.Ct. 2505 (1986) (emphasis added).

4. "[I]n order to recover damages for allegedly unconstitutional
conviction or imprisonment, or for other harm caused by actions whose
unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff
must prove that the conviction or sentence has been reversed on direct appeal,
expunged by executive order, declared invalid by a state tribunal authorized to

1 make such determination, or called into question by a federal court's issuance of a
2 writ of habeas corpus.... A claim for damages bearing that relationship to a
3 conviction or sentence that has not been so invalidated is *not* cognizable under §
4 1983. Thus, when a state prisoner seeks damages in a § 1983 suit, the district
5 court must consider whether a judgment in favor of the plaintiff would
6 necessarily imply the invalidity of his conviction or sentence; if it would, the
7 complaint must be dismissed...."

8 *Heck v. Humphrey*, 512 U.S. 477, 486-487, 114 S.Ct. 2364 (1994).

9 5. *Heck* says that "if a criminal conviction arising out of the same facts
10 stands and is fundamentally inconsistent with the unlawful behavior for which
11 section 1983 damages are sought, the 1983 action must be dismissed." *Smith v.*
12 *Hemet*, 394 F.3d 689, 695 (2005); *Smithart v. Towery*, 79 F.3d 951, 952 (9th Cir.
13 1996); *see Hooper v. County of San Diego*, 629 F.3d 1127, 1134 (9th Cir. 2011)
14 ("we conclude that a conviction under California Penal Code §148(a)(1) does not
15 bar a § 1983 claim for excessive force under *Heck* when the conviction and the §
16 1983 claim are based on different actions during one continuous transaction.")
17 (internal quotation marks omitted).

18 6. For a Penal Code § 148(a)(1) conviction to be valid, the criminal
19 defendant must resist, delay, or obstruct the officer in the **lawful** exercise of his
20 duties. *Smith*, 394 F.3d at 695.

21 7. The lawfulness of the officer's conduct is an essential element of the
22 crime. *See People v. Curtis*, 70 Cal.2d 347, 354-356 (1969); *Susag v. City of*
23 *Lake Forest*, 94 Cal.App.4th 1401, 1409 (2002).

24 8. Therefore, if the officer was not performing his or her duties at the
25 time of the arrest, the arrest is unlawful and the arrestee cannot be convicted
26 under Penal Code § 148(a)(1). *Smith*, 394 F.3d at 695.

27 9. "Excessive force used by a police officer *at the time of the arrest* is
28 not within the performance of the officer's duty." *Smith*, 394 F.3d at 695

1 (emphasis in original); citing *People v. Olguin*, 119 Cal.App.3d 39, 45-46 (1981).

2 10. Additionally, federal district courts have held that *Heck v. Humphrey*
3 bars a plaintiff's Section 1983 action for excessive force absent proof that a
4 conviction under Penal Code § 148(a) has been invalidated by appeal or other
5 proceeding. *Franklin v. County of Riverside*, 971 F.Supp. 1332, 1336 (C.D.Cal.
6 1997); *Nuno v. County of San Bernardino*, 58 F.Supp.2d 1127, 1133-1134
7 (C.D.Cal. 1999).

8 11. The California Supreme Court has applied the *Heck* principle to
9 claims brought under California law. *Yount v. City of Sacramento*, 43 Cal.4th
10 885, 902 (2008). "[W]e cannot think of a reason to distinguish between section
11 1983 and a state tort claim arising from the same alleged misconduct..." *Id.*

12 12. "The Fourth Amendment requires police officers making an arrest to
13 use only an amount of force that is objectively reasonable in light of the
14 circumstances facing them." *Blankenhorn v. City of Orange*, 485 F.3d 463, 477
15 (9th Cir. 2007), citing *Tennessee v. Garner*, 471 U.S. 1, 7-8, 105 S.Ct. 1694, 85
16 L.Ed.2d 1 (1985).

17 13. "Neither tackling nor punching a suspect to make an arrest
18 necessarily constitutes excessive force." *Id.*, citing *Graham v. Connor*, 490 U.S.
19 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) ("Not every push or shove,
20 even if it may seem unnecessary in the peace of the judge's chambers, ... violates
21 the Fourth Amendment") (internal quotation marks omitted).

22 14. The question in all cases is whether the use of force was "objectively
23 reasonable in light of the facts and circumstances confronting" the arresting
24 officers. *Graham*, 490 U.S. at 397, 109 S.Ct. 1865 (internal quotation marks
25 omitted).

26 15. "To determine whether a specific use of force was reasonable, [the
27 court] must balance the nature and quality of the intrusion on the individual's
28 Fourth Amendment interests against the countervailing government interests at

1 stake.” *Blankenhorn*, 485 F.3d 463, 477 (internal quotation marks and citation
2 omitted).

3 16. Relevant factors to this inquiry include, but are not limited to, “the
4 severity of the crime at issue, whether the suspect poses an immediate threat to
5 the safety of the officers or others, and whether he is actively resisting arrest or
6 attempting to evade arrest by flight.” *Graham*, 490 U.S. at 396, 109 S.Ct. 1865.

7 17. The reasonableness determination must also make “allowance for the
8 fact that police officers are often forced to make split-second judgments – in
9 circumstances that are tense, uncertain, and rapidly evolving – about the amount
10 of force that is necessary in a particular situation.” *Id.* at 396-97.

11 18. Plaintiff’s attempt to rewrite the facts in his favor is “utterly
12 discredited by the record that no reasonable jury could [] believe him.” *Scott v.*
13 *Harris*, 550 U.S. 372, 380, 127 S.Ct. 1769, (2007) (“When opposing parties tell
14 two different stories, one of which is blatantly contradicted by the record, so that
15 no reasonable jury could believe it, a court should not adopt that version of the
16 facts for purposes of ruling on a motion for summary judgment.”).

17 19. The Supreme Court has explained that “[t]he doctrine of qualified
18 immunity protects government officials from liability for civil damages insofar as
19 their conduct does not violate clearly established statutory or constitutional rights
20 of which a reasonable person would have known.” *Pearson v. Callahan*, 555
21 U.S. 223, 129 S.Ct. 808, 815, 172 L.Ed.2d 565 (2009) (internal quotation marks
22 omitted).

23 20. “Qualified immunity shields an officer from liability even if his or
24 her action resulted from “a mistake of law, a mistake of fact, or a mistake based
25 on mixed questions of law and fact.” *Id.* (internal quotation marks omitted).

26 21. To determine whether an officer is entitled to qualified immunity,
27 courts employ a two-step test: “first, [courts] decide whether the officer violated a
28 plaintiff’s constitutional right; if the answer to that inquiry is yes, [courts] proceed

1 to determine whether the constitutional right was clearly established in light of
2 the specific context of the case at the time of the events in question.” *Mattos v.*
3 *Agarano*, 661 F.3d 433, 440 (9th Cir. 2011); *see Pearson v. Callahan*, 555 U.S.
4 223, 236, 129 S.Ct. 808, 172 L.Ed.2d 565 (courts may “exercise their sound
5 discretion in deciding which of the two prongs of the qualified immunity analysis
6 should be addressed first in light of the circumstances in the particular case at
7 hand.”).

8 22. In determining this second prong of the qualified immunity test,
9 “[courts] ask whether [the constitutional rights’] contours were sufficiently clear
10 that every reasonable official would have understood that what he is doing
11 violates that right.” *Mattos*, 661 F.3d at 442 (internal quotation marks omitted).

12 23. In regard to Officer Gunn’s use of his Taser, the law was not clearly
13 established at the time of the subject incident on April 10, 2009. *See Bryan v.*
14 *MacPherson*, 630 F.3d 805, 833 (9th Cir. 2010) (due to recent statements
15 regarding the use of tasers and the dearth of prior authority, the court held that the
16 officer could have made a reasonable mistake of law regarding the
17 constitutionality of taser use in July 2005 and therefore the officer is entitled to
18 qualified immunity); *see also Mattos v. Agarano*, 661 F.3d 433, 452 (9th Cir.
19 2011).

20 24. Until 2010, the Ninth Circuit of the Court of Appeals had not clearly
21 delineated the use of taser weapons and the quantum of force entailed by a taser
22 strike. *McMurray v. County of Sacramento*, 2011 WL 4709876, *19-20 (E.D.
23 Cal. 2011); *see also Johnson v. Bay Area Rapid Transit*, 790 F.Supp.2d 1034,
24 1040, 1060-1061 (N.D. Cal. 2011) (“At the time of the incident here [on January
25 1, 2009], the law was not clearly established that threatening to tase in order to
26 gain compliance with orders would be an unconstitutional use.”).

27 25. To state a claim under California Civil Code § 52.1, a plaintiff
28 cannot merely show that Defendants violated his or her rights under state or

1 federal law; a plaintiff must also show that the interference with his or her rights
2 was accomplished through “**threats, intimidation, or coercion.**” Cal. Civ. Code
3 § 52.1(a) (emphasis added); *see Austin B. v. Escondido Union School Dist.*, 149
4 Cal.App.4th 860, 882-883 (2007); *City and County of San Francisco v. Ballard*,
5 136 Cal. App. 4th 381 (2006); *Haynes v. City and County of San Francisco*, 2010
6 WL 2991732 at *6 (N.D. Cal. 2010).

7 26. The requirement that Plaintiff plead and prove “threats, intimidation
8 or coercion”, however, is distinct from the requirement that Plaintiff prove a
9 violation of his state or federal constitutional rights. *Barsamian v. City of*
10 *Kingsburg*, 597 F.Supp.2d 1054, 1064 (E.D.Cal. 2009) (“[W]hether a
11 constitutional violation occurred and whether that violation was accompanied by
12 any threats, intimidation or coercion are separate analytical inquiries.”).

13 27. In other words, courts have found that a showing of an interference
14 with a legal right must be **shown separately** from an excessive force claim. *See,*
15 *Justin v. City and County of San Francisco*, 2008 WL 1990819, at *9 (N.D. Cal.
16 2008) (finding that the plaintiff’s excessive force claim did not establish a
17 violation of an interference with a state or federal constitutional right).

18 28. Several courts that have interpreted § 52.1 have held that a plaintiff
19 cannot bring a § 52.1 claim only alleging that a defendant “used force to interfere
20 with [the plaintiff’s] right to be free from bodily restraint.” *Justin v. City and*
21 *County of San Francisco* 2008 WL 1990819, *9 (N.D. Cal. 2008).

22 29. In *Justin*, the plaintiff alleged that the defendants interfered with the
23 decedent’s “right to be free from violence and the threat of violence” and failed
24 “to provide timely and adequate medical assistance.” *Id.*

25 30. The District Court dismissed the Civil Code § 52.1 cause of action
26 under that theory, noting that “a claim under Section 52.1 cannot be predicated on
27 allegations that [the defendants] used force to interfere with [the decedent’s] right
28 to be free from bodily restraint or harm.” *Id.*

1 31. “Section 52.1 is only applicable when a defendant intends by his or
2 her conduct to interfere with a separate, affirmative right enjoyed by a plaintiff; it
3 does not apply to a plaintiff’s allegation of use of excessive force absent a
4 showing that the act was done to interfere with a separate state or federal
5 constitutional right.” *Id.*

6 32. In *Rodriguez v. City of Fresno*, 2011 WL 1883195, *12 (E.D.Cal.
7 2011), the District Court analyzed this issue and similarly agreed.

8 33. “The text of the Bane Act and such case authority as the court can
9 find indicates that a cause of action under the act requires a predicate – the
10 application of threat, intimidation or coercion – and an object – interference with
11 a constitutional or statutory right.” *Id.*

12 34. The District Court concluded “that in order to maintain a claim under
13 the Bane Act, the coercive force applied against a plaintiff must result in an
14 interference with a separate constitutional or statutory right. *Id.* at *13. **It is not**
15 **sufficient that the right interfered with is the right to be free of the force or**
16 **threat of force that was applied.”** *Id.* (emphasis added).

17 35. Similarly, in *Lanier v. City of Fresno*, 2011 WL 149802 (E.D.Cal.
18 2011), a District Court denied a plaintiff’s motion for reconsideration of the
19 dismissal of his Section 52.1 claim against a police officer who shot him.

20 36. In the operative pleading, the plaintiff alleged that he attempted to
21 surrender to a police officer moments after fleeing from a vehicle that the officer
22 was pursuing. *Id.* at *1.

23 37. The plaintiff alleged that the officer shot him multiple times in the
24 back even though the plaintiff “posed no threat of death or serious physical harm
25 to anyone and lacked a weapon.” *Id.*

26 38. The court ruled that a Civil Code § 52.1 claim “requires misconduct
27 with accompanying threats, intimidation, or coercion.” *Id.* at *5.

28 39. Finding no such allegation, the Court dismissed the plaintiff’s Civil

1 Code § 52.1 claim at the pleading stage. *Id.*

2 40. The Court explained, “[a]lthough the FAC alleges facts that Officer
3 Castillo interfered with [the plaintiff’s] Fourth Amendment rights, there are no
4 allegations that Officer Castillo did so with threats, intimidation, or coercion or
5 interfered with the rights separate from those under the Fourth Amendment.” *Id.*

6 41. In *Gant v. County of Los Angeles* (C.D.Cal. 2011) 765 F.Supp.2d
7 1238, the court explained the unsettled nature of the law on this issue before
8 ultimately concluding that “a wrongful arrest and detention, without more, cannot
9 constitute ‘force, intimidation, or coercion’ for purposes of Section 52.1.” *Gant*
10 *v. County of Los Angeles* (C.D.Cal. 2011) 765 F.Supp.2d 1238; *see Shoyoye v.*
11 *County of Los Angeles*, 203 Cal.App.4th 947, 959 (2012) (“we conclude that
12 where coercion is inherent in the constitutional violation alleged, i.e., an over-
13 detention in County jail, the statutory requirement of threats, intimidation, or
14 coercion is not met. The statute requires a showing of coercion independent from
15 the coercion inherent in the wrongful detention itself.”) (internal quotation marks
16 omitted).

17 42. The California Supreme Court in *Hughes v. Pair*, 46 Cal.4th 1035,
18 1050-51 (2009), reiterated the elements that a plaintiff is required to prove on an
19 intentional infliction of emotional distress (“IIED”) claim: “(1) outrageous
20 conduct by the defendant; (2) intention to cause or reckless disregard of the
21 probability of causing emotional distress, (3) severe emotional suffering and (4)
22 actual and proximate causation of the emotional distress.” *Id.* at 1376 (internal
23 quotation marks omitted).

24 43. Whether behavior is extreme and outrageous is a legal determination
25 to be made by the court, in the first instance. *Fowler v. Varian Associates, Inc.*,
26 196 Cal.App.3d 34, 44 (1987).

27 ///

28 ///

1 44. "Severe emotional distress [is] emotional distress of such
2 substantial quantity or enduring quality that no reasonable man [or woman]
3 in a civilized society should be expected to
4 endure it." *Fletcher v. Western Life Insurance Co.*, 10 Cal.App.3d 376, 397
5 (1970) (emphasis added.)

6 45. "Although 'emotional distress may consist of any highly unpleasant
7 mental reaction such as fright, grief, shame, humiliation, embarrassment, anger,
8 chagrin, disappointment or worry' *Fletcher v. Western National Life Insurance*
9 *Company*, 10 Cal.App.3d 376, 397 (1970), to make out a claim, the plaintiff must
10 prove that emotional distress was *severe* **and not trivial or transient.**" *Wong v.*
11 *Tai Jing*, 189 Cal.App.4th 1354, 1376 (italics in original; bold emphasis added)

12 46. The Ninth Circuit has also held that feeling "emotionally hurt,"
13 experiencing nervousness and tension, and feeling threatened or scared did not
14 rise to the level of severe emotional distress. *Simo v. Union of Needletrades,*
15 *Industrial & Textile Employees*, 322 F.3d 602, 621-22 (9th Cir. 2003).

16 47. "An assault is an unlawful *attempt*, coupled with a present ability, to
17 commit a violent injury on the person of another." Cal. Pen. Code § 240; 5
18 Witkin, *Summary of California Law* (9th ed. 1988), Torts, § 346, p. 436.

19 48. "A battery is any willful and unlawful use of *force or violence upon*
20 *the person* of another." Cal. Pen. Code § 242; 5 Witkin, *Summary of California*
21 *Law* (9th ed. 1988), Torts, § 346, p. 436.

22 49. In a civil action for assault and battery against a police officer, the
23 plaintiff must prove that the officer used unreasonable force as an element of the
24 tort. *See Edson v. City of Anaheim*, 63 Cal.App.4th 1269, 1272 (1998);
25 *Valiavicharska v. Celaya*, 2011 WL 6370059, *11 (N.D. Cal. 2011).

26 50. It is well established that a police officer in California may use
27 reasonable force to make an arrest, prevent escape or overcome resistance, and
28 need not desist in the face of resistance. *See Penal Code* § 835a.

1 51. The reasonableness of a particular use of force must be judged from
2 the perspective of a reasonable officer on the scene, rather than with 20/20
3 hindsight. *Graham*, 490 U.S. at 397.
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5 Dated: June 4, 2012

LAWRENCE BEACH ALLEN & CHOI, PC

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7 By /s/ Nathan A. Oyster
8 Nathan A. Oyster
9 Attorneys for Defendant
Burbank Police Department Officer Gunn
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